

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 10, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 96-3320

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

ELVIN CROSBY, D/B/A HAMPTON TAP,

PLAINTIFF-APPELLANT,

v.

CITY OF MILWAUKEE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County:
MICHAEL D. GUOLEE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Elvin Crosby appeals from the circuit court's order upholding the Milwaukee Common Council's decision, based upon the recommendation of its Utilities and Licenses Committee, to deny Crosby's application for renewal of his Class B tavern license. Crosby argues that the circuit court erred in upholding the Common Council's decision because: (1) the

Committee allegedly considered evidence that was not presented at the hearing in making its recommendation; (2) the Committee allegedly based its recommendation upon neighborhood objections about which Crosby did not receive notice; and (3) the Committee based its decision upon allegedly “inaccurate and untrue information.” We affirm.

I. BACKGROUND

Crosby owned and operated a Milwaukee tavern called the Hampton Tap. On April 6, 1996, Crosby filed an application to renew his tavern license. The application was sent to the Milwaukee Police Department for investigation, pursuant to Chapter 90 of the Milwaukee Code of Ordinances, and the Police Department filed objections to the renewal of Crosby’s license. A notice was sent to Crosby informing him that on May 21, 1996, a hearing was to be held on his tavern license renewal application, and that there was a possibility that the application would be denied because of Police Department objections; a copy of the objections was attached to the notice.¹

On May 21, 1996, a hearing was held before the Utilities and Licenses Committee. The Police Department presented its objections to the renewal of Crosby’s license, and Crosby, by counsel, responded to those objections. The Committee voted to recommend that the Common Council deny Crosby’s application for renewal, and entered findings of fact and conclusions of law in support of that recommendation. Crosby filed written objections to the

¹ The objections were based upon the repeated presence of underage patrons in the tavern, multiple instances of violence in or near the tavern, an instance of patrons serving themselves from liquor bottles, the discovery of drugs and weapons in and near the tavern, and the failure of the tavern to properly display its license.

Committee's recommendation, and appeared before the Common Council for a hearing on his license renewal application on June 4, 1996. Crosby, by counsel, presented argument opposing denial of his application for renewal, and requested that a twenty-day suspension be imposed instead. The Council voted to accept the Committee's recommendation and deny renewal of Crosby's license. Crosby appealed that decision to the circuit court pursuant to § 125.12(2)(d), STATS., and the circuit court upheld the Council's decision.²

II. DISCUSSION

Our review of the Council's decision to deny renewal of Crosby's tavern license is *de novo* and is limited to the following questions: (1) whether the Council stayed within its jurisdiction; (2) whether the Council acted according to law; (3) whether the Council's action was arbitrary, oppressive or unreasonable, representing its will and not its judgment; and (4) whether the evidence was such that the Council might reasonably have made the determination under review. *See State ex rel. Smith v. City of Oak Creek*, 131 Wis.2d 451, 455, 389 N.W.2d 366, 367 (Ct. App. 1986), *aff'd*, 139 Wis.2d 788, 407 N.W.2d 901 (1987).

Crosby argues that the Council erred in denying renewal of his tavern license because the Committee's recommendation to the Council was allegedly based upon evidence that was not presented at the hearing. He asserts

² Section 125.12(2)(d), STATS., provides, in relevant part:

Judicial review. The action of any municipal governing body in granting or failing to grant, suspending or revoking any license, or the failure of any municipal governing body to revoke or suspend any license for good cause, may be reviewed by the circuit court for the county in which the application for the license was issued, upon application by any applicant, licensee or resident of the municipality.... The decision shall be binding unless it is appealed to the court of appeals.

that the Committee's consideration of evidence not presented at the hearing was error because it violated an ordinance governing the procedure for renewal of tavern licenses. The ordinance provides: "The recommendation of the committee regarding the applicant must be based on evidence presented at the hearing." MILWAUKEE CODE OF ORDINANCES § 90-11-7-c-1.

Crosby asserts that a member of the committee improperly mentioned that there were neighborhood objections to Crosby's previous license renewal and thereby influenced the Committee to base its recommendation on evidence that was not presented at the hearing. We reject Crosby's argument.

First, Crosby himself raised the subject of the neighborhood objections in his argument to the Committee that his license should be renewed because conditions had improved since his renewal the previous year. Crosby, by counsel, stated: "There are no neighborhood objectors this year. The problem stems from underage persons, which we have rectified. I believe Mr. Pratt [an alderman] will testify that things seem to be going very well at Hampton Tap since the last time here." It was this comment by Crosby that initiated the Committee's discussion of the neighborhood objectors of the previous year. Thus, Crosby himself presented evidence of the neighborhood objectors to the committee for consideration. Crosby's argument that the Committee improperly considered evidence not presented at the hearing is without merit. Moreover, Crosby has not established that the Committee based its recommendation upon that discussion. The Committee entered written findings of fact and conclusions of law indicating that its recommendation was based upon the incidents reflected in the police objections; there were no findings of fact or conclusions of law regarding any neighborhood objections.

Crosby next argues that the Council erred in denying renewal of his tavern license because he did not receive notice that his license could be denied based on neighborhood objections. As noted, Crosby has not established that the Council based its recommendation on neighborhood objections, and therefore the Council was not required to send Crosby notice of such objections. Further, Crosby himself raised the issue of neighborhood objectors, and he therefore cannot complain that he did not have notice of such objections. *See Shawn B. N. v. State*, 173 Wis.2d 343, 372, 497 N.W.2d 141, 152 (Ct. App. 1992) (an appellant cannot complain of an error that the appellant induced).

Crosby's final argument is that the Council erred in denying renewal of his license because the report of the police objections contained "inaccurate and untrue information." Crosby did not object to the use of the report at the hearing before the Committee, nor did he challenge the report before the Council.³ Crosby also did not raise this issue before the circuit court. He has therefore waived the issue. *See* RULE 901.03(1)(a), STATS. (error may not be predicated upon the admission of evidence unless the appellant makes a specific and timely objection); *see also Omernick v. DNR*, 94 Wis.2d 309, 312, 287 N.W.2d 841, 843 (Ct. App. 1979), *aff'd*, 100 Wis.2d 234, 301 N.W.2d 437, *cert. denied*, 454 U.S. 883 (1981) (a party cannot raise an issue on review if the issue was not raised in the administrative proceeding); *Poling v. Wisconsin Physicians Serv.*, 120 Wis.2d 603, 610, 357 N.W.2d 293, 297–298 (Ct. App. 1984) (matters not argued in the trial court but raised for the first time on appeal are deemed waived). Further, Crosby has failed to identify any finding of the Committee that reflects inaccurate

³ In fact, Crosby conceded before the Council that a sanction was appropriate based upon the police objections, but argued that a suspension was a more appropriate sanction.

information. Thus, Crosby has not shown that he was prejudiced by any inaccuracies. *See* RULE 901.03(1), STATS. (error may not be predicated upon the erroneous admission of evidence unless a substantial right of the party is affected); RULE 805.18, STATS. (no judgment shall be reversed on the ground of improper admission of evidence unless the error has affected the substantial rights of the party seeking to reverse the judgment).

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

